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CHARLES ELMORE

No. 556

# In the Supreme Court of the United States

OCTOBER TERM, 1942

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CREEK, STATE OF OKLAHOMA, A MUNICIPAL CORPORATION, ET AL., PETITIONERS

*v.*

EVELYN SEBER ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES, AMICUS CURIAE

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statutes involved | 2 |
| Statement | 3 |
| Summary of argument | 5 |
| Argument | 8 |
| I. The background of the Acts of June 20, 1936, and May 19, 1937 | 9 |
| II. The Act of June 20, 1936, was applicable to exempt from 1937 Oklahoma real estate taxes the lands purchased from the trust or restricted funds of Wosey John Deere | 31 |
| 1. The application of the Act of June 20, 1936, is not limited to lands purchased from funds appropriated by Congress for "landless Indians" | 33 |
| 2. On January 1, 1937, Wosey John Deere "held title" to the lands within the meaning of the Act of June 20, 1936 | 36 |
| III. The Act of May 19, 1937, is applicable to the lands purchased from the trust or restricted funds of Wosey John Deere and held by her children as homestead lands subject to restrictions against alienation or encumbrance | 37 |
| 1. The application of the Act of May 19, 1937, is not limited to lands purchased from funds appropriated by Congress for "landless Indians" | 38 |
| 2. The Act of May 19, 1937, grants an exemption to lands purchased from trust or restricted funds of an Indian so long as the lands are restricted even though they have passed to Indian grantees | 39 |
| IV. The Acts of June 20, 1936, and of May 19, 1937, are constitutional | 41 |
| Conclusion | 53 |
| Appendix | 54 |




513962—43——1

## CITATIONS


| Cases: | Page |
|---|---|
| *American Ins. Co. v. Canter*, 1 Peters 511 | 11 |
| *Bank v. Supervisors*, 7 Wall. 26 | 45 |
| *Barker v. Harvey*, 181 U. S. 481 | 31 |
| *Blanset v. Cardin*, 256 U. S. 319 | 34 |
| *Board of Commissioners v. Central Baptist Church*, 136 Okla. 99 | 31 |
| *Board of Commissioners v. United States*, 308 U. S. 343 | 17, 44 |
| *Bowling v. United States*, 233 U. S. 528 | 41 |
| *Brader v. James*, 246 U. S. 88 | 14, 19, 20, 22, 48, 52 |
| *Carpenter v. Shaw*, 280 U. S. 363 | 19 |
| *Cherokee Nation v. Georgia*, 5 Peters 1 | 9, 13 |
| *Cherokee Nation v. Hitchcock*, 187 U. S. 294 | 14 |
| *Choate v. Trapp*, 224 U. S. 665 | 19, 43, 47, 48 |
| *Choctaw and Chickasaw Nations v. United States*, 75 Ct. Cls. 494 | 11 |
| *Choctaw & Gulf R. R. v. Harrison*, 235 U. S. 292 | 43 |
| *Clinkenbeard v. United States*, 109 F. (2d) 730 | |
| *Drummond v. United States*, 34 F. (2d) 755 | 32 |
| *Elk v. Wilkins*, 112 U. S. 94 | 52 |
| *Federal Land Bank v. Bismark Co.*, 314 U. S. 95 | 44, 46 |
| *Gillespie v. Oklahoma*, 257 U. S. 501 | 17 |
| *Gleason v. Wood*, 28 Okla. 502, reversed, 224 U. S. 679 | 14, 43 |
| *Goodell v. Jackson*, 20 Johns 693 | 10 |
| *Goudy v. Meath*, 203 U. S. 146 | 25, 44, 46 |
| *Hollowell v. United States*, 221 U. S. 317 | 19 |
| *Heckman v. United States*, 224 U. S. 413 | 15, 20, 52 |
| *Helm v. Belvin*, 107 Okla. 214 | 36 |
| *Helvering v. Gerhardt*, 304 U. S. 405 | 46 |
| *Helvering v. Mountain Producers Corp.*, 303 U. S. 376 | 17, 45 |
| *Howard v. Gypsy Oil Co.*, 247 U. S. 503 | 17, 44 |
| *Indian Territory Illuminating Co. v. Oklahoma*, 240 U. S. 522 | 17, 44 |
| *James v. Dravo Contracting Co.*, 302 U. S. 134 | 46 |
| *Jaybird Mining Co. v. Weir*, 271 U. S. 609 | 17 |
| *Kansas Indians*, 5 Wall. 737 | 9, 15 |
| *Large Oil Co. v. Howard*, 248 U. S. 549 | 17, 44 |
| *Lawrence v. Shaw*, 300 U. S. 245 | 45 |
| *Lee v. Osceola Imp. District*, 268 U. S. 643 | 45 |
| *Lone Wolf v. Hitchcock*, 187 U. S. 553 | 13 |
| *McCulloch v. Maryland*, 4 Wheat. 316 | 44, 47 |
| *McCurdy v. United States*, 246 U. S. 263 | 22, 25 |
| *McIntosh v. Dill*, 86 Okla. 1 | 14 |
| *Minnesota v. United States*, 125 F. (2d) 636 | 51 |
| *Missouri v. Holland*, 252 U. S. 416 | 12 |
| *Muskogee County v. United States*, decided January 6, 1943 | 5, 33 |
| *National Bank of Commerce v. Anderson*, 147 Fed. 87 | 21, 22 |
| *New York Indians*, 5 Wall. 761 | 9 |

Cases—Continued. Page

*Oklahoma* v. *Barnsdall Corp.*, 296 U. S. 521 ..... 44
*Oklahoma Tax Commission* v. *United States*, Nos. 623–625, this Term, certiorari granted, February 15, 1932 ..... 50
*Pennsylvania R. R. Co.* v. *International Coal Min. Co.*, 230 U. S. 184 ..... 34
*Pittman* v. *Home Owners' Corp.*, 308 U. S. 21 ..... 44
*Railroad Company* v. *Peniston*, 18 Wall. 5 ..... 45
*Riley* v. *Collier*, 111 Okla. 130 ..... 36
*Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575 ..... 3, 16, 26, 44, 45
*Sinclair Prairie Oil Co.*, In re, 175 Okla. 289 ..... 31
*Smith* v. *Kansas City Title Co.*, 255 U. S. 180 ..... 44
*Stephens* v. *Cherokee Nation*, 174 U. S. 445 ..... 13
*Sunderland* v. *United States*, 266 U. S. 226 ..... 14, 21, 22, 23, 46
*Tiger* v. *Western Investment Co.*, 221 U. S. 286 ..... 13, 14, 15, 19, 47, 52
*Trotter* v. *Tennessee*, 290 U. S. 354 ..... 45
*United States* v. *Board of Commissioners*, 26 F. Supp. 270 ..... 35
*United States* v. *Brown*, 8 F. (2d) 564 certiorari denied, 270 U. S. 644 ..... 24, 26, 35
*United States* v. *Candelaria*, 271 U. S. 432 ..... 10, 15
*United States* v. *Celestine* ..... 19
*United States* v. *Creek Nation*, 295 U. S. 103 ..... 48
*United States* v. *Gray*, 284 Fed. 103 ..... 26
*United States* v. *Holliday*, 3 Wall. 407 ..... 10
*United States* v. *Homeratha*, 40 F. (2d) 305 ..... 32
*United States* v. *Kagama*, 118 U. S. 375 ..... 12, 13
*United States* v. *Law*, 250 Fed. 218 ..... 24
*United States ex rel. Marcus* v. *Hess*, No. 173, this Term, decided January 18, 1943 ..... 34
*United States* v. *McGowan*, 302 U. S. 535 ..... 13, 51, 52
*United States* v. *Mille Lac Chippewas*, 229 U. S. 498 ..... 11
*United States* v. *Nez Perce County*, 267 Fed. 495 ..... 24, 26, 30
*United States* v. *Nice*, 241 U. S. 591 ..... 19, 20, 52
*United States* v. *Noble*, 237 U. S. 74 ..... 19
*United States* v. *Ramsay*, 271 U. S. 467 ..... 52
*United States* v. *Ranson*, 284 Fed. 108, affirmed, 263 U. S. 691 ..... 26
*United States* v. *Reily*, 290 U. S. 33 ..... 41
*United States* v. *Rickert*, 188 U. S. 432 ..... 16, 25, 43
*United States* v. *Rogers*, 4 How. 566 ..... 11
*United States* v. *Sandoval*, 231 U. S. 28 ..... 13
*United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77 ..... 34
*United States* v. *Thurston County*, 143 Fed. 287 ..... 21, 22
*United States* v. *Wright*, 53 F. (2d) 300, certiorari denied, 285 U. S. 539 ..... 50
*United States* v. *Yakima County*, 274 Fed. 115 ..... 24, 26, 30

Cases—Continued. Page

*Van Brocklin* v. *Tennessee*, 117 U. S. 151 ..... 45
*Waldon* v. *Baker*, 184 Okla. 492 ..... 36
*Ward* v. *Love County*, 253 U. S. 17 ..... 19, 44
*Webb, Ex parte*, 225 U. S. 663 ..... 13, 47
*Worcester* v. *Georgia*, 6 Peters 515 ..... 9, 10, 13, 15
*Wynn* v. *Fugate*, 149 Okla. 210 ..... 14

Constitution and Statutes:

Article I, Section 8, clause 3 ..... 10
Article II, Section 2 ..... 10
Act of July 22, 1790, 1 Stat. 137 ..... 10
Indian Trade and Intercourse Act of June 30, 1934, 4 Stat. 729 ..... 10
General Allotment Act of 1887, 24 Stat. 388 ..... 14
Act of March 1, 1901, 31 Stat. 861 ..... 17, 42
Act of June 30, 1902, 32 Stat. 500 ..... 18, 42
Joint Resolution of March 2, 1906, 35 Stat. 822 ..... 53
Act of April 26, 1906, 34 Stat. 137 ..... 18, 53
Oklahoma Enabling Act of June 16, 1906, 34 Stat. 267 ..... 13, 47
Act of May 27, 1908, 35 Stat. 312 ..... 19, 22, 32
Act of May 10, 1928, 45 Stat. 495 ..... 19
Act of March 2, 1931, 45 Stat. 1471 ..... 29, 41
Act of June 20, 1932, 47 Stat. 474 ..... 29, 41
Act of January 27, 1933, 47 Stat. 777 ..... 52
Wheeler-Howard Act of June 18, 1934, 48 Stat. 984 ..... 16
Act of June 20, 1936, 49 Stat. 1542 ..... 2, 3, 5, 29, 31, 38, 54
Act of June 26, 1936, 49 Stat. 1967 ..... 16, 53
Act of May 19, 1937, 50 Stat. 188 ..... 4, 6, 30, 37, 55
Treaty of March 24, 1832, Article XIV, 7 Stat. 366 ..... 42
60 Okla. St. Anno. § 69 ..... 36

Miscellaneous:

Cohen, *Handbook of Federal Indian Law* (1942) ..... 12, 14, 18, 21, 34
Debo, *And Still the Waters Run* (1940) ..... 14
Executive Order 8034, 4 Fed. Reg. 249 ..... 51
H. Rep. 562, 75th Cong., 1st Sess., pp. 1–2 ..... 35, 38
H. Rep. 2398, 74th Cong., 2d Sess ..... 29
Kinney, *A Continent Lost—A Civilization Won* (1937) ..... 14
Meriam, *The Problem of Indian Administration* (Brookings Institute, 1928) ..... 21, 22, 24, 27, 51
38 Op. A. G. 577 ..... 35
Opinion of the Solicitor, 56 I. D. 48 ..... 34
Otis, D. S., *History of the Allotment Policy*, Hearings, Committee on Indian Affairs, 73d Cong., 2d Sess., on H. R. 7902 ..... 14
S. Rep. 332, 75th Cong., 1st Sess ..... 36, 40
S. Rep. 2468, 74th Cong., 2d Sess ..... 29

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## BRIEF FOR THE UNITED STATES, AMICUS CURIAE

### OPINIONS BELOW

The opinion of the district court is not included in the record but is reported 38 F. Supp. 731. The opinion of the circuit court of appeals (R. 56–67) and the dissenting opinion (R. 67–99) are reported 130 F. (2d) 666.

### JURISDICTION

The judgment of the circuit court of appeals was entered September 2, 1942 (R. 99–100). The petition for a writ of certiorari was filed November

30, 1942, and granted January 11, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

1. Whether lands purchased by the Secretary of Interior for a full-blood Creek Indian with the royalties from leases of her allotted land, and subsequently conveyed to her children subject to the reservation of a life estate, none of which could be conveyed or encumbered without approval of the Secretary, were exempt from Oklahoma real estate tax for 1937 by virtue of the Act of June 20, 1936.

2. Whether homestead lands purchased by the Secretary of Interior for a full-blood Creek Indian with royalties from leases of her allotted land, which were subject to restrictions against alienation or encumbrance without the approval of the Secretary and which with his approval were subsequently conveyed to her full-blood Indian heirs subject to like restrictions, are exempt from Oklahoma real estate tax by virtue of the Act of June 20, 1936, as amended by the Act of May 19, 1937.

3. Whether the Acts of June 20, 1936, and May 19, 1937, so applied, are constitutional.

## STATUTES INVOLVED

The Act of June 20, 1936, 49 Stat. 1542, and the Act of May 19, 1937, 50 Stat. 188, which amended the earlier Act, are set forth in the Appendix, pp. 54–55, *infra*.

## STATEMENT

Prior to 1931 the Secretary of the Interior purchased three tracts of land in Creek County, Oklahoma, for Wosey John Deere, an enrolled, full-blood member of the Creek Tribe of Indians. The purchase price was paid out of royalties from an oil and gas lease of her allotted, restricted land. She was given title to the land purchased, subject to a condition against alienation or encumbrance without approval of the Secretary (R. 14–16, 16–18, 18–20). In 1931, with the approval of the Secretary of the Interior, she conveyed the fee to her children, Evalin Seber, Jimmie Poesheik, and Juanita Deere, subject to a like condition against alienation or encumbrance without approval of the Secretary; but she reserved a life estate (R. 21–22).

Until enactment of the Act of June 20, 1936, 49 Stat. 1542, the lands were subject to Oklahoma real estate taxes.[1] By Section 2 of that Act Congress provided:

> All lands the title to which is now held by an Indian subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of the trust or restricted funds of said Indian, are hereby declared to be instrumentalities of the Federal Government and shall be

[1] *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U. S. 575.

nontaxable until otherwise directed by Congress.

Nevertheless, all three lots were continued on the tax rolls of Creek County and taxes for the year 1937 were levied and assessed upon the lands.

On May 19, 1937, Section 2 of the Act of June 20, 1936, was amended to provide that all restricted homestead lands theretofore purchased with restricted funds should be tax exempt; and the amendment also provided for the designation of lands as homestead (see Appendix, p. 55 *infra*). On December 10, 1937, Wosey John Deere conveyed her life estate to her three children so that they became full owners subject to a restriction against alienation or encumbrance without approval of the Secretary (R. 22–24). Thereafter, the children with the approval of the Secretary designated the county tracts "as a tax-exempt homestead," pursuant to the amendment to Section 2 of the Act of June 20, 1936 (R. 24–26). Nevertheless, taxes for the years 1938–1940 were assessed against the country as well as the city tracts.

To avoid accumulation of penalties and interest and a sale of the land for taxes, the children paid a large portion of the taxes (R. 43–44, 47) and brought this action for recovery and for a declaration that the homestead land was immune from taxation by the State (R. 5–13). The district court held that all the lands were exempt from 1937 taxes and that the lands designated as home-

stead were exempt from taxes for 1938 and subsequent years (R. 48–50). The circuit court of appeals affirmed (R. 56–67, 99–100).[2]

## SUMMARY OF ARGUMENT

### I

The original Act of June 20, 1936, declared tax-exempt "all lands the title to which is held by an Indian subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of said Indian * * *." In 1937 title to a freehold life estate in the lands in question was held by Wosey John Deere with the remainder in her children in fee, both subject to restrictions against alienation or encumbrance except with the approval of the Secretary; the lands had theretofore been purchased with the restricted funds of Wosey John Deere. Therefore, if the Act is constitutional, the lands in question were exempt from the 1937 tax.

[2] The district court also held all the lands exempt from 1936 taxes but the circuit court of appeals reversed the judgment on this point on the ground that the taxes were assessed as of January 1, 1936, before enactment of the Act of June 20, 1936 (R. 64–67, 100). It adhered to this ruling in *Muskogee County* v. *United States*, decided January 6, 1943. No cross-petition for certiorari has been filed in the instant case so that for present purposes we accept the ruling as correct.

There is no warrant for any interpolation limiting the exemption to lands purchased for so-called "landless Indians" who had never been allotted tribal lands. At one time restricted lands purchased with Indian trust funds were assumed to be tax exempt, and many Indians had been encouraged to make such purchases out of proceeds from the sale or lease of their allotted lands. Subsequent decisions proved this view to be wrong. The reports of both the House and Senate Committees show that the purpose of the Act was to give all such lands theretofore purchased the tax exempt character which they had mistakenly been assumed to possess. The subsequent legislative history confirms this view.

Likewise, there is no basis for the suggestion that Wosey John Deere did not hold "title" to the lands within the meaning of the Act because she had conveyed a future interest to her children. She held the dominant life estate and, under Oklahoma law, was liable for the tax. She held the only "title," therefore, with which an act granting a tax exemption would be concerned.

II

The homestead lands designated by the children of Wosey John Deere fall within the exemption granted by the Act of May 19, 1937. That Act declares non-taxable "all homesteads, heretofore purchased out of trust or restricted funds of individual Indians * * * : *Provided*, That the title to such homesteads shall be held subject to

restrictions * * *." The lands were properly designated as homesteads, were purchased from the individual funds of Wosey John Deere, and are held subject to the restrictions required.

The words of the amended Act make it clear that the exemption attaches to the lands in the hands of subsequent holders (if they hold subject to restrictions) as well as in the hands of the original purchaser. Whatever the meaning of the original Act, there is nothing in reason, in the legislative history, or in authority, to show that under the amended Act, contrary to the plain meaning of its words, the exemption was intended to be personal. On the contrary, it has been customary for Congress to make tax exemptions run with the land.

## III

Congress has the unquestioned power to protect Indian lands, individual as well as tribal, against all forms of interference of private persons or state officials. Equally clear is the power of Congress to protect and preserve the operations of the federal government against interference by State taxation. By virtue of this power it has the equally well-established authority to exempt from State taxation lands allotted in severalty to individual Indians out of tribal property which are held by them subject to restrictions against alienation or encumbrance. Such

lands are federal instruments in a very real sense; by dividing the ownership and control, Congress has both protected the Indian's property and made provision for his support and education.

In regulating Indian affairs the federal government is not, however, limited to preserving the property which formerly belonged to the Tribes. It may develop or convert the restricted, allotted lands, which were formerly tribal property, and may use the proceeds to acquire other property. Lands purchased out of the proceeds and held by the federal government and the Indian under an arrangement similar to the holding of the restricted, alloted lands are equally the implements of federal policy; they too are used to perform the duty of the federal government to protect, support, and educate its Indian wards. Since the federal power extends so far and since the purchased lands are federal implements, the protective power must also reach them. The propriety of its exercise in view of its repercussions upon the revenues of a State is a question for Congress. A similar question arises whenever the federal government broadens its activities and acquires new property formerly subject to State taxation.

ARGUMENT

The instant case presents the narrow questions, (1) whether Congress has attempted to exempt

from tax all the lands (later only the homesteads) of Indians purchased with their trust or restricted funds and held by them subject to a restriction against alienation or encumbrance except with the approval of the Secretary, and (2) whether Congress has the constitutional authority to grant such an exemption. But although the Acts deal only with lands acquired for Indians with their trust or restricted funds, and not with Indian property generally, the scope of the Acts and their constitutionality must be considered in the light of their function in meeting Indian problems. Therefore, in order that the place of these Acts may be apparent, we shall, at the outset, review the general outlines of the legislation and judicial decisions concerning Indian property and the Government's relationship to it, out of which the legislation in issue developed.

## I

### THE BACKGROUND OF THE ACTS OF JUNE 20, 1936, AND MAY 19, 1937

*The development and source of the federal power over Indian affairs.*—The relationship of the federal government to the Indians and its control over their property have developed gradually. In early times, the tribes were recognized as separate but dependent nations, free from control of the States. See, generally, *Cherokee Nation* v. *Georgia*, 5 Peters 1; *Worcester* v. *Georgia*, 6 Peters 515; *Kansas Indians*, 5 Wall. 737; *New York In-*

*dians*, 5 Wall. 761. The federal government dealt with them by treaties under Article II, Section 2, and, in general, regulated them by legislation only to control intercourse between them and the whites, pursuant to Article I, Section 8, clause 3 (the power "To regulate Commerce * * * with the Indian tribes"). As the Constitutional power vested in Congress over commerce with foreign nations had been construed to cover commerce with individual foreigners, so the power of Congress with Indian tribes was held to include all forms of trade and intercourse with individual Indians. *United States* v. *Holliday*, 3 Wall. 407, 417. From earliest times, this authority was exercised with special vigor in respect to the chief property which the Indians had to trade, their land. (Act of July 22, 1790, 1 Stat. 137; Indian Trade and Intercourse Act of June 30, 1934, 4 Stat. 729). It was exercised to protect Indian lands, individual or tribal, against all forms of alienation or encumbrance, voluntary or involuntary, not expressly permitted by treaty or statute. (See *Worcester* v. *Georgia*, *supra*; *Kansas Indians*, *supra*; *United States* v. *Candelaria*, 271 U. S. 432; *Goodell* v. *Jackson*, 20 Johns 693 at 722–723, 729.

The expansion of white settlements, the Indian wars and subsequent treaties, and the removal of the Indians to the West and then to reservations, evoked further extension of federal control; but since the Indians, in general, lived on

the public domain in federal territory those exercises of federal power which could not be justified under express constitutional provisions could be supported upon the theory expounded by Chief Justice Marshall and Chief Justice Taney that power to legislate for territory within the jurisdiction of the United States must reside in the federal government because no State possessed it. See *American Ins. Co.* v. *Canter*, 1 Peters 511, 542; *United States* v. *Rogers*, 4 How. 566, 572.

Even after the territories in which they lived had been organized as States, the federal power over the Indians was never seriously doubted, although its source has been a subject of dispute. It would seem, however, that the power is derived from history and necessity, and might, if an express provision were required, be said to take its ultimate origin in the commerce clause, the treaty-making power and in the "necessary and proper clause" of Article I. As a result of constant pressure to open new lands, the federal government exercised its war and treaty-making powers in such a way as, on the one hand, to secure repeated cessions of Indian lands and, on the other, to assume the governmental duty[3] of affording the Indians, an uneducated and de-

[3] *Barker* v. *Harvey*, 181 U. S. 481, 492; *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 509, and cases cited; *Choctaw and Chickasaw Nations* v. *United States*, 75 Ct. Cls. 494.

pendent people, protection against the selfishness of others and their own improvidence. For example, in the case of the Creek Tribe, members of which are here involved, a chief element in the Treaty of August 7, 1790, 7 Stat. 35, and in the 25 subsequent treaties (see Cohen, *Handbook of Federal Indian Law*, (1942), p. 464) was the undertaking to protect Creek property against interference. Having in the exercise of its delegated powers created a situation in which protection was required and having either expressly or impliedly undertaken the resultant governmental obligation to afford that protection, the federal government had the consequent authority to do all that was necessary to perform the obligation even though the Indians resided within the boundaries of the States. Cf. *Missouri* v. *Holland*, 252 U. S. 416. This rationale was summarized by Mr. Justice Miller in *United States* v. *Kagama*, 118 U. S. 375, 384.

> From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

But whatever its source, the existence of federal power to regulate and protect the Indians and

their property against all interference is beyond dispute. *Cherokee Nation* v. *Georgia*, 5 Peters 1; *Worcester* v. *Georgia*, 6 Peters 515; *United States* v. *Kagama*, 118 U. S. 375; *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 568; *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *United States* v. *Sandoval*, 231 U. S. 28; *Brader* v. *James*, 246 U. S. 88; *United States* v. *McGowan*, 302 U. S. 535.

Moreover, the existence of federal authority over Indians and their property was recognized by Oklahoma when she became a State in 1906. The Oklahoma Enabling Act provided that the United States should retain (34 Stat. 267–268):

> the authority * * * to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this [Enabling] Act had never been passed.

By its acceptance Oklahoma conceded that the federal government had plenary power to regulate and protect the property of its Indian wards from any interference to the same extent as before statehood was conferred (*Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309; *Ex parte Webb*, 225 U. S. 663; compare *United States* v. *Sandoval*, 231 U. S. 28) and, since then, she has recognized the power of the federal government to manage and legislate with respect to Indian property within her bound-

aries (*Gleason* v. *Wood*, 28 Okla. 502, 506, reversed, 224 U. S. 679; *McIntosh* v. *Dill*, 86 Okla. 1; *Wynn* v. *Fugate*, 149 Okla. 210).

Embraced within the broader power there was, of course, the power to hold and manage Indian property, to change its form, to lease it, to allot it in severalty, to give it to the Indian outright or subject to restrictions, and to resume control even though complete dominion had previously been released. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Brader* v. *James*, 246 U. S. 88; *Sunderland* v. *United States*, 266 U. S. 226. However, it is chiefly with the allotment of property in severalty and the power of the federal government over the allotted lands and their proceeds that we are presently concerned.

*Restricted, Allotted Lands.*—The General Allotment Act of 1887, 24 Stat. 388, although it had predecessors of limited application,[1] marked a change in the policy of the federal government toward Indian property. Previously, most Indian property was held by Tribes and not by individ-

[1] For such treaties and statutes, see Cohen, *Handbook of Federal Indian Law*, pp. 206–207. The history of Indian land tenure with emphasis on the allotment policy and its defects is exhaustively set forth in Kinney, *A Continent Lost—A Civilization Won* (1937). A more critical study is found in D. S. Otis, *History of the Allotment Policy*, Hearings, Committee on Indian Affairs, 73d Cong., 2d Sess., on H. R. 7902. With reference to the Five Civilized Tribes, see Debo, *And Still the Waters Run* (1940).

uals; with it we are not presently concerned except to point out that Indian property was beyond the jurisdiction of a state to tax even though it was located within her boundaries. *Kansas Indians*, 5 Wall. 737; cf. *Worcester* v. *Georgia*, 6 Peters 515. Under the General Allotment Act and other specific acts, tribal lands were divided in severalty among the members of the various tribes with a view toward assimilating the Indians. But Indian allottees did not become the owners outright. By the device of a trust patent or a restricted fee, the allottees were denied power to alienate or encumber their lands for fixed periods of time, which have from time to time been extended. Conveyances by Indian allottees in defiance of the restrictions were held invalid and the United States, capable of maintaining suits to set such conveyances aside. *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Heckman* v. *United States*, 224 U. S. 413; *United States* v. *Candelaria*, 271 U. S. 432.

Under the allotment acts, Indian lands have been uniformly regarded as having two important characteristics deriving from the relationship of the United States to the Indians. First, the allotted lands are property which the United States is under governmental obligation to protect and preserve as the property of its Indian "wards." *Heckman* v. *United States*, 224 U. S. 413. Second, the allotted lands are the means by which the

United States provides for the welfare of the Indians and educates them, so far as possible, to assume the responsibilities of property and manage their own affairs.[5] *United States* v. *Rickert*, 188 U. S. 432; *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575.

As a result of these two characteristics it was early decided that under the Constitution allotted lands could be exempted from taxation by the State. *United States* v. *Rickert*, 188 U. S. 432. In that case the Court pointed out that State taxation would interfere with the purpose of Congress by preventing performance of a covenant in the trust patent allotting the lands to turn over the lands unencumbered at the end of 25 years, and then held (p. 437):

> They [the Indians] occupy these lands with the consent and authority of the United States, and the holding of them * * *

[5] Allotments in severalty were halted by the Wheeler-Howard Act of June 18, 1934, 48 Stat. 984, and by the Oklahoma Welfare Act of June 26, 1936, 49 Stat. 1967. These Acts, particularly the former, reflected a major change in policy. The theory of the allotment acts was that the Indians could best be assimilated into white society through the break-up of tribal government and property, and especially through the compulsory individualization of Indian land. The theory of much recent legislation is that Indians can better meet the problems of modern life through corporate, group, or tribal action than as assimilated individuals, and that corporate property holding, collective responsibility, and tribal self-government should therefore be encouraged.

> is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship. * * * To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race * * *.

Thus the implied statutory exemption of lands allotted in severalty subject to restrictions against alienation was sustained at least in part squarely upon the ground that the lands were instruments of federal policy immunized from State taxation. Since the *Rickert* case the tax free character of restricted, allotted lands has been clear, and questions have arisen chiefly concerning the scope of the immunity as applied to non-Indians developing the land. *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U. S. 522; *Howard* v. *Gypsy Oil Co.*, 247 U. S. 503; *Large Oil Co.* v. *Howard*, 248 U. S. 549; *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609; cf. *Board of Commissioners* v. *United States*, 308 U. S. 343. Compare *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, overruling *Gillespie* v. *Oklahoma*, 257 U. S. 501.

Although the Creeks were not affected by the General Allotment Act, their lands were allotted in severalty under an agreement negotiated by the Dawes Commission and incorporated into the Act of March 1, 1901 (31 Stat. 861) as amended by a

supplemental agreement incorporated into the Act of June 30, 1902 (32 Stat. 500). The members of the Tribe were enrolled and each was allotted 160 acres out of which a homestead of 40 acres was selected by each member. The homestead was declared to be "nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years * * *." The remaining lands, commonly referred to as surplus, were not to be alienated or encumbered for 5 years from June 30, 1902 (section 7 of original agreement, as amended by section 16 of the supplemental agreement). By the Act of April 26, 1906, section 19 (34 Stat. 137, 144), all of the lands of full bloods were made restricted for a period of 25 years and all restricted lands were declared to be exempt from taxation as long as the title remained in the original allottee.

By subsequent statutes the restrictions upon the allotted lands of Indians of the Five Civilized Tribes were altered from time to time in respects of no importance here, as were the exemptions conferred. See Cohen, *op. cit. supra*, pp. 439–442. Today the allotted lands, both homestead and surplus, held by Indians of the Five Civilized Tribes of three-fourths or more Indian blood and the

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Wosey John Deere was an enrolled member of the Creek Tribe (R. 6) and, unquestionably, it was pursuant to these Acts that she received the allotted lands from which accrued the royalties used to purchase the lands in suit.

homestead allotments held by Indians having one-half or more than one-half and less than three-fourths Indian blood may not be alienated until 1956, except with the approval of the Secretary of the Interior, who may remove the restrictions according to such rules and regulations as he may prescribe. Act of May 27, 1908, Section 9, 35 Stat. 312, 315. By express enactment 160 acres of allotted lands are exempt from tax. Act of May 10, 1928, Section 4, 45 Stat. 495, 496.

Two additional points concerning allotted lands should be marked. First, although the grant of tax exemption has been regarded as creating a vested right which even Congress cannot disturb (*Choate* v. *Trapp*, 224 U. S. 665; *Ward* v. *Love County*, 253 U. S. 17; *Carpenter* v. *Shaw*, 280 U. S. 363), the Court squarely decided that allotment legislation was subject to changes extending the restrictions and that, so long as the property was held by an Indian, restrictions could be reimposed even though for a time the property had been freed. *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Brader* v. *James*, 246 U. S. 88. Second, it is equally well-established that the grant of citizenship to an Indian is in no way inconsistent with the exercise of authority over his lands. *United States* v. *Celestine*, 215 U. S. 278, 291; *Hallowell* v. *United States*, 221 U. S. 317; *United States* v. *Noble*, 237 U. S. 74, 79; *United States* v. *Nice*, 241 U. S. 591.

Both points were clearly stated in *Brader* v. *James*, 246 U. S. 88, 96:

> While the tribal relation existed the national guardianship continued, and included authority to make limitations upon the rights which such Indians might exercise in respect to such lands as are here involved [Creek lands freed of restriction under an earlier statute by devolution to a full blood Creek heir]. This authority did not terminate with the expiration of the limitation upon the rights to dispose of allotted lands; the right and duty of Congress to safeguard the rights of the Indians still continued. It has been frequently held by this court that the grant of citizenship is not inconsistent with the right of Congress to continue to exercise this authority by legislation deemed adequate to that end. It is unnecessary to again review the decisions of this court which support that authority. Some of them were reviewed in the *Tiger Case*. The doctrine is reiterated in *Heckman* v. *United States*, 224 U. S. 413, and *United States* v. *Nice*, 241 U. S. 591, 598.

*Proceeds of Allotted Lands.*—Although a purpose of the allotment acts was to provide land for each Indian to settle upon and cultivate, in practice many allotments were worthless as farms and others far more valuable for minerals, oil, and timber. Sales and leases of the restricted property were made and the proceeds were converted into trust or restricted funds for the Indians. Such

personal property has been generally regarded as standing in lieu of the allotted lands, subject to the same or similar restrictions and favored with the same tax exemptions, because it is the means by which the federal government executes its duty and power to support, protect, and educate the Indians. *United States* v. *Thurston County*, 143 Fed. 287 (C. C. A. 8); *National Bank of Commerce* v. *Anderson*, 147 Fed. 87 (C. C. A. 9); (both seemingly approved in *Sunderland* v. *United States*, 266 U. S. 226). Whether, in the absence of an express statute, the immunity extends to other Indian funds need not be considered here.*

*Restricted Lands Purchased out of Trust Funds.*—We come, therefore, to the kind of Indian property involved in the instant case—property purchased for individual Indians by the federal government out of the proceeds of sales or leases of allotted lands, or out of other restricted funds. Although petitioners may describe their acquisition as the investment of royalties received by wealthy owners of oil and mineral lands—and doubtless that aspect of the matter exists—nevertheless the problem is more realistically viewed as one of procuring farms and homes for Indians whose original allotments were unsuitable. As stated in the Meriam Report to the Secretary of

* This question is discussed briefly in Cohen, *op. cit. supra*, pp. 262–263.

the Interior on *The Problem of Indian Administration* (Brookings Institute, 1928), p. 795:

> The volume of such purchases [from restricted funds] is large because the allotments originally made to Indians are often not suitable for homes. These original allotments must be sold and new property purchased if the Indians are to be started on the road to better social and economic conditions. In order to preserve these new lands for the use and benefit of the Indian owner, it has been the uniform rule to impose upon them the restrictions which existed upon the funds with which they were obtained. * * *

Although there are few early decisions, there seems never to have been any serious question of the power of the federal government to restrict the ability of an Indian to alienate or encumber lands purchased for him from his trust or restricted funds,[9] thus devoting the purchased lands to the

[9] See *United States* v. *Thurston County*, 143 Fed. 287 (C. C. A. 8); *National Bank of Commerce* v. *Anderson*, 147 Fed. 87 (C. C. A. 9). In *McCurdy* v. *United States*, 246 U. S. 263, it was held that the Secretary of the Interior could not restrict the lands bought by an Osage Indian out of trust funds released to the Indian outright six months earlier. The Court made clear, however, that the federal power over the Indians was broad enough to warrant such action if Congress authorized it, viz:

"While an Indian is still a ward of the Nation there is power in Congress even to reimpose restrictions upon property already freed. *Brader* v. *James*, 246 U. S. 88; but Congress did not confer upon the Secretary of the Interior authority to exercise such power under the circumstances of this case or to give to property purchased with released funds immunity from state taxation."

same federal uses which made it constitutional for Congress to exempt allotted lands from State taxation. In respect to Creek Indians, both the constitutional power of the federal government and the statutory authority of the Secretary of the Interior were sustained in *Sunderland* v. *United States*, 266 U. S. 226. The case was this: Section 1 of the Act of May 27, 1908, 35 Stat. 312, authorized the Secretary to remove restrictions upon the sale of Creek allotted lands "under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe." Acting thereunder, the Secretary, pursuant to regulations, permitted the sale of the restricted lands of a Creek allottee, held the proceeds subject to restrictions, and later permitted them to be used to purchase land upon condition that the deed of conveyance contain a clause prohibiting alienation or encumbrance without approval of the Secretary. Nevertheless, the Indian attempted to convey the land. The Court held, first, that there was power, so long as the Indians were wards of the Government, thus to interpose "the strong shield of federal law to the end that they be not overreached or despoiled in respect of their property of whatsoever kind or nature" (p. 234); and, second, that "the authority of the Secretary to withhold his consent to the proposed investment of the proceeds subject to his control, includes the lesser authority to allow the

investment upon condition that the property into which the proceeds are converted shall be impressed with a like control" (p. 235).[10]

This power of the Secretary to invest the proceeds of allotted lands in other lands more suitable for Indian uses and to restrict its alienation is not confined to the Creeks. On the contrary, the same power has been granted in respect of lands allotted under the General Allotment Act,[11] and has been widely exercised to meet the problem of supplying the Indians with suitable farms and homes. Meriam, *loc. cit. supra.* It is fair to say, therefore, that the power of the federal government to acquire new property for Indians and to regulate it, has long been recognized and

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[10] It was pursuant to the authority conferred by Section 1 of the Act of May 27, 1908, and sustained in the *Sunderland* case that the Secretary bought the lands in question and imposed restrictions upon them. The restricted funds used were proceeds of a lease of Wosey John Deere's allotted lands and not of a sale, but it has not heretofore been supposed that this difference is material. The proceeds of leases are subject to the same measure of control by the Secretary and the reasoning of the *Sunderland* case has been regarded as controlling. See *United States* v. *Brown*, 8 F. (2d) 564 (C. C. A. 8), certiorari denied, 270 U. S. 644.

Likewise, the reason of the *Sunderland* case is the basis for the well established practice of permitting conveyances of restricted Indian lands to other Indians subject to a restriction. See p. 32, n. 18, *infra*.

[11] *United States* v. *Yakima County*, 274 Fed. 115 (E. D. Wash.); *United States* v. *Nez Perce County*, 267 Fed. 495 (D. Idaho). See also *United States* v. *Law*, 250 Fed. 218 (C. C. A. 8).

is an established part of the management of Indian affairs.

But although the power to acquire new lands and restrict them has been generally regarded as clear, the tax status of such lands was long confused. For a time the prevailing Departmental opinion was that the lands, being restricted, stood in the place of the allotted lands and were federal instrumentalities exempt from state taxation.[12] The decisions of this Court were not opposed. Compare *United States* v. *Rickert*, 188 U. S. 432, holding restricted allotted lands exempt, with *Goudy* v. *Meath*, 203 U. S. 146, holding that in the absence of an express manifestation of that intent Congress would not be held to have exercised its power to exempt unrestricted land from state taxes. See also *McCurdy* v. *United States*,

[12] Solicitor's Opinion of October 11, 1915, D–39322; Circular No. 1849, issued by the Commissioner of Indian Affairs under date of February 3, 1923; letter from the Second Assistant Commissioner of Indian Affairs to William E. Borah, United States Senate, dated February 18, 1913, approved by the Assistant Secretary of the Interior February 19, 1913; letter from the Assistant Commissioner of Indian Affairs to the Secretary of the Interior dated December 14, 1915, approved December 16, 1915, dealing with lands purchased for Indians of the Five Civilized Tribes; letter dated June 21, 1919, from the First Assistant Secretary to the Attorney General relating to the taxability of lands purchased for a Creek Indian of the Five Civilized Tribes; letter from the Commissioner of Indian Affairs to Hon. P. W. Burns, State's Attorney, Dewey County, Timber Lake, South Dakota, dated January 11, 1928, approved by the Assistant Secretary January 13, 1928.

246 U. S. 263. And two district courts had held that restricted lands acquired with the proceeds of sale of allotted lands were tax-exempt. E. g. *United States* v. *Nez Perce County*, 267 Fed. 495 (D. Idaho); *United States* v. *Yakima County*, 274 Fed. 115 (E. D. Wash.).

Two decisions of the Circuit Court of Appeals for the Eighth Circuit cast doubt upon the supposition that restricted lands purchased from the proceeds of restricted allotted lands were tax free;[13] and in 1928 *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575, raised the issue squarely in this Court. The Court decided that the lands were instruments of federal policy which Congress could constitutionally exempt from tax but that the gradual legislative relaxation of restrictions and withdrawal of tax exemptions were convincing that Congress did not intend the "mere conveyancer's restriction" imposed by the Secretary to free the lands from tax. It held (pp. 580–581):

> In a broad sense all lands which the Indians are permitted to purchase out of the taxable lands of the state in this process of their emancipation and assumption of the responsibility of citizenship, whether restricted or not, may be said to be instru-

[13] *United States* v. *Gray*, 284 Fed. 103; *United States* v. *Ranson*, 284 Fed. 108, affirmed, 263 U. S. 691; see *United States* v. *Brown*, 8 F. (2d) 564, certiorari denied, 270 U. S. 644.

> mentalities in that process. But they are far less intimately connected with the performance of an essential governmental function than were the restricted allotted lands, and the accomplishment of their purpose obviously does not require entire independence of state control in matters of taxation. * * * There are some instrumentalities which, though Congress may protect them from state taxation, will nevertheless be subject to that taxation unless Congress speaks. [Citations omitted.] These lands we take to be of that character.

But although the previous course of legislation had been such as to convince the Court of the Congressional purpose to limit tax exemption of Indian lands,[14] it was subsequently revealed in the Meriam Report that there was serious need for granting a tax exemption to restricted lands purchased from restricted funds. After pointing out that such lands must often be acquired if the development of the Indian is to advance (see p. 22, *supra*), the report continued (pp. 795–796):

> In order to preserve these new lands for the use and benefit of the Indian owner, it has been the uniform rule to impose upon them the restrictions which existed upon the funds with which they were obtained.

[14] But note the subsequent shift in policy evidenced by the Wheeler-Howard Act and Oklahoma Welfare Act, p. 16, n. 5, *supra*.

> Some states are claiming and exercising the power to tax such lands. Since the Indian owner, on account of his lack of ready funds or his insufficient sense of public responsibility, either cannot or will not pay taxes, the result is that the lands purchased for his permanent home are speedily slipping from him and he himself is becoming a homeless public charge. This unfortunate situation is rendered more acute because the terms of the deeds prohibit alienation by voluntary act, and thus the Indian owner is not able either to mortgage or sell his lands to secure for himself the interest that he may have in the land over and above the delinquent taxes.

Then, after discussing the decisions prior to the *Shaw* case, the report made this express recommendation (p. 797):

> If, as has been inferred, there be doubt as to the intention of Congress to give immunity from state taxation, it is recommended that legislation be secured expressly conferring the exemption. The states will not suffer from such a practice, for in return for the lost taxes on the purchased lands will be the subjection to the state taxing power of the relinquished lands, or of the funds used in making the new purchase.

In the case of Indians of the Five Civilized Tribes this recommendation was partly adopted in 1931 in an act providing that whenever the Secretary

should thereafter sell nontaxable, restricted land, he should have power to reinvest the proceeds in other land which should likewise be nontaxable and restricted [15] and the following year the statute was amended to extend like relief to other Indians.[16] But in respect to lands already purchased the difficulty remained.

A second problem also came to light after the decision in the *Shaw* case. As we have shown, the Government had erred in its opinion and had represented to the Indians that lands which were purchased by them under the supervision of the Secretary out of their restricted funds and held by them subject to restrictions against alienation or encumbrance would be tax-free. Many Indians had failed to pay taxes in reliance on the representation and there was, in any event, a need to keep faith.

Thereafter, the Act of June 20, 1936, here involved, came before Congress. It was intended to meet with the situation which we have described. Both the Senate and House Committees, which reported the bill favorably in the form recommended by the Commissioner for Indian Affairs, included in their reports a letter from the Secretary of the Interior explaining the bill (S. Rep. 2168, H. Rep. 2398, 74th Cong., 2d Sess.). The letter referred to the mistaken belief that the lands were tax free

[15] Act of March 2, 1931, 45 Stat. 1471.
[16] Act of June 20, 1932, 47 Stat. 474.

(citing the *Yakima* and *Nez Perce County* cases, *supra*), to the representations made to the Indians, and to the fact that some had lost their lands, and concluded (p. 2)—

> This bill is intended to stop further taxation of restricted lands now held by Indians which have been purchased for them with their individually owned trust or restricted funds, and to redeem or reacquire any such lands heretofore sold for nonpayment of taxes. * * *

The bill was enacted in the form recommended. Section 1 appropriated money to redeem or repurchase lands taken for taxes; Section 2 provided—

> SEC. 2. All lands the title to which is now held by an Indian subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of said Indian, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress.

During the following year it was found that this section was too broad and it was amended by the Act of May 19, 1937, 50 Stat. 188, to grant the exemption to all homestead lands purchased with restricted funds of an Indian if title was held subject to restrictions (see p. 37 *infra*).

## II

### THE ACT OF JUNE 20, 1936, WAS APPLICABLE TO EXEMPT FROM 1937 OKLAHOMA REAL ESTATE TAXES THE LANDS PURCHASED FROM THE TRUST OR RESTRICTED FUNDS OF WOSEY JOHN DEERE

The Act of June 20, 1936 (p. 29, *supra*), declares exempt from State taxation Indian lands which meet two conditions, and only two. First, title must be held "subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary." Second, the lands must have been theretofore "purchased out of trust or restricted funds of said Indian." If those qualifications are met, then, so far as the Act can exempt them, the lands are immune from tax.

In Oklahoma the taxable status of property is fixed as of January 1 of each year although taxes are levied as of July 1, which is the beginning of the fiscal and taxable year.[17] On January 1, 1937, the lands in question were held "subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary." Wosey John Deere, who would be liable for any tax, held the life estate with the remainder in her children; valid restrictions were imposed by the Secre-

[17] *Board of Commissioners* v. *Central Baptist Church*, 136 Okla. 99; *In re Sinclair Prairie Oil Co.*, 175 Okla. 289, 293–295, 296. Since no cross-petition for certiorari was filed we do not here urge that the Act of June 20, 1936, exempted the lands from 1936 taxes assessed thereafter regardless of the taxable status of the land on January 1 of that year.

tary when the land was purchased for Wosey John Deere from her restricted funds and were imposed upon the children in the deeds by which the remainder was conveyed to them (R. 14–16, 16–18, 18–20, 21–22).[18] Also, the lands were purchased from the "trust or restricted funds" of Wosey John Deere. Thus, both qualifications are met.

In seeking to avoid the force of the original Act in respect of the 1937 taxes, petitioners make two arguments. They say first (Pet. 19–21)[19] that the Act does not apply to lands "purchased from trust or restricted funds" at all (although Congress used those very words), but applies only to lands pur-

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[18] It is settled that the Secretary has power under Sections 1 and 2 of the Act of May 27, 1908, 35 Stat. 313, to include a restraint upon alienation or encumbrance without his approval in any deed by which he acquires land for a Creek Indian from trust or restricted funds received from sale or lease of allotted, restricted lands. See pp. 23–24, *supra*. The restricted funds of Wosey John Deere came from royalties from an oil lease of her alloted, restricted lands (R. 15–16).

The Secretary also has power to restrict the lands in the hands of Indian grantees (the children, in the instant case), upon approving a conveyance of restricted Indian land. This well-established practice has often been approved. *Drummond* v. *United States*, 34 F. (2d) 755 (C. C. A. 8); *Clinkenbeard* v. *United States*, 109 F. (2d) 730 (C. C. A. 10); Opinion below, R. 66; *United States* v. *Homeratha*, 40 F. (2d) 305 (W. D. Okla.).

[19] At the time when it was necessary to send this brief to press we had not received petitioners' brief. Consequently, we refer to the petition for certiorari for the points which petitioners make concerning the interpretation and constitutionality of the statutes involved.

chased by the Secretary of Interior for "landless Indians" from funds appropriated by Congress for that purpose. Second, petitioners seem to contend (Pet. 21–23) that the original Act exempted only lands held by the Indian whose funds were used for the purchase, and that these lands were not so held on January 1, 1937, because Wosey John Deere, although she held the life estate and was liable to pay the taxes, had conveyed the remainder to her children. Neither contention can maintained.

1. *The application of the Act of June 20, 1936, is not limited to lands purchased from funds appropriated by Congress for "landless Indians."*

The contention that the Act of June 20, 1936, applies only to Indians whose lands were purchased from funds appropriated by Congress because they owned no other lands, is belied by the very words of the Act. The Act speaks of lands "purchased out of trust or restricted funds" and, as the court below pointed out in *Muskogee County* v. *United States,* decided January 6, 1943, "there is certainly nothing in the text of the original Act which indicates a congressional purpose to limit the scope of the Act to Indians not already seized of allotted lands." Senator Thomas' statenient (80 Cong. Rec. 9159) that the Act was designed to immunize only lands purchased from congressional appropriations for "landless Indians" was evidently the result of a misunderstanding, and cannot control

the interpretation of the Act contrary to its clear words. *Pennsylvania R. R. Co.* v. *International Coal Min. Co.*, 230 U. S. 184; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77; *United States ex rel. Marcus* v. *Hess*, No. 173, this Term, decided January 18, 1943.

In any event, more authoritative indicia of the congressional purpose are convincing that in this respect the words of the Act accurately express the congressional intent. As we have shown, there was a need to grant an exemption from taxation to lands purchased from the restricted funds of Indians whose allotted lands were, for one reason or another, unsuited for Indian use; and this was particularly true in the case of Indians who had been led to believe that the lands so purchased were exempt from tax. Solution of these problems by legislation had been recommended in 1928 in the Meriam report, and the House and Senate Committee reports on the bill show plainly that this was the problem at which it aimed. See pp. 29–30, *supra*. Likewise, the Department of Interior, which drafted and supported the Act, has given it this construction. Opinion of the Solicitor, 56 I. D. 48; Cohen, *op. cit. supra*, pp. 260–261. Under those circumstances its interpretation is a persuasive factor in ascertaining the Congressional intent. *Blanset* v. *Cardin*, 256 U. S. 319, 326. On the other hand, we find no history nor material before Congress that furnishes the slightest founda-

tion for Senator Thomas' statement and petitioners' elaborate argument that the Act was part of a program for acquiring lands for "landless Indians" who were not included in treaties relative to the distribution of land.

The subsequent congressional history of the 1936 Act confirms this interpretation. On February 13, 1937, Acting Attorney General (now Mr. Justice) Reed gave his opinion that Section 2 exempted from taxes lands which were purchased from the restricted funds of individual Osage Indians (who were not "landless") in addition to their homestead allotments (38 Op. A. G. 577).[20] Subsequently, in reporting a bill (H. R. 3008, 75th Cong., 1st Sess.) to repeal Section 2 of the 1936 Act, the House Committee on Indian Affairs stated, "It will be observed from the language of section 2, which is as follows * * * that *it applies to all lands purchased by restricted Indian funds*, and the Attorney General so held" (H. Rep. 562, 75th Cong., 1st Sess., pp. 1–2). [Italics added.] A Senate bill (S. 150) to limit Section 2 to homestead lands purchased from restricted funds was substituted for the repealer, and became the Act of May 19, 1937 (p. 37, *infra*,) but the Senate committee report also makes clear that the original Act covered all restricted Indian lands

[20] It was so held in *United States* v. *Board of Commissioners*, 26 F. Supp. 270.

purchased out of restricted funds (S. Rep. 332, 75th Cong., 1st Sess.).

2. *On January 1, 1937, Wosey John Deere "held title" to the lands within the meaning of the Act of June 20, 1936.*

For present purposes we may assume *arguendo* that petitioners are correct in their contention (Pet. 23) [21] that under the 1936 Act the exemption extends only to lands "title to which is held by the person whose funds were used to purchase the land. Even upon that assumption, the lands in question were exempt from taxes for 1937. They were bought with the funds of Wosey John Deere and, on January 1, 1937, she held a restricted life estate and her children a restricted remainder in fee. This holding of title to the life estate fulfills the requirements of the Act. In Oklahoma the life tenant is under a duty to pay the taxes on the land; their burden falls on him and his estate. 60 Okla. St. Anno. § 69; *Helm* v. *Belvin*, 107 Okla. 214; *Riley* v. *Collier*, 111 Okla. 130; *Waldon* v. *Baker*, 184 Okla. 492, 494. Consequently, every consideration of policy making for an exemption while the entire restricted fee is held by an Indian purchaser applies with equal force while the Indian purchaser holds the life estate. Under such circum-

[21] For reasons stated, pp. 39–40, *infra*, we believe that this contention is, in fact, erroneous and that the 1936 Act extends the exemption to *lands* in accordance with the usual Congressional policy.

stances it is impossible to suppose that Congress intended the exemption to be defeated simply by a conveyance of any one of the bundle of rights of which "title" is composed. Since the Act is concerned with a tax exemption, the test of whether an Indian purchaser has "title" must be whether he has retained such a property interest that, but for the Act, he would be subjected to the tax. Wosey John Deere retained such a "title" in the instant case.

## III

### THE ACT OF MAY 19, 1937, IS APPLICABLE TO THE LANDS PURCHASED FROM THE TRUST OR RESTRICTED FUNDS OF WOSEY JOHN DEERE AND HELD BY HER CHILDREN AS HOMESTEAD LANDS SUBJECT TO RESTRICTIONS AGAINST ALIENATION OR ENCUMBRANCE

The homestead lands involved in the instant case meet the description set forth in the Act of May 19, 1937. It provides:

> All homesteads, heretofore purchased out of the trust or restricted funds of individual Indians * * * shall be nontaxable until otherwise directed by Congress: *Provided,* That the title to such homesteads shall be held subject to restrictions * * *

Respondents' lands were properly designated as homestead. They were purchased from the trust funds of an individual Indian, Wosey John Deere. And they are held subject to restrictions against alienation or encumbrance without the approval of

the Secretary. It would seem too plain for argument, therefore, that Act applies.

Nevertheless, petitioners contend that that Act should be differently construed. They say, first, that it applies only to lands purchased by "landless Indians," making the same argument as is made in respect to the 1936 Act, and, second, that after 1937 the lands were no longer exempt because they were held not by Wosey John Deere but by her grantees. Neither interpretation is sound.

1. *The application of the Act of May 19, 1937, is not limited to lands purchased from funds appropriated by Congress for "landless Indians".*

We have shown above that the Act of June 20, 1936, was intended, in accordance with its words, to grant the exemption in the case of "all lands * * * purchased out of trust or restricted funds of [an] Indian", whether or not the Indian also held other lands. That the Act of May 19, 1937, has that meaning, limited to homesteads, is doubly clear. When the 1937 Act was before Congress, the House Committee on Indian Affairs stated that the 1936 Act applied to all Indians and to all lands purchased from restricted funds, and pointed out that the Attorney General had so held (H. Rep. 562, 75th Cong., 1st Sess., pp. 1–2). Thereafter, the 1937 Act was enacted; Congress repeated the same words but substituted "homesteads" for lands. In view of this history it would be wholly improper to read into the 1937

Act any limitation to so-called "landless Indians".

'2. *The Act of May 19, 1937, grants an exemption to lands purchased from trust or restricted funds of an Indian so long as the lands are restricted even though they have passed to Indian grantees.*

The 1937 Act clearly and explicitly provides that homesteads purchased out of the trust funds of individual Indians shall be tax exempt provided they are held subject to restrictions against alienation or encumbrance without the approval of the Secretary. The Act does not say, and there is not a word to suggest, that the exemption is to terminate upon transfer of the lands to Indian heirs or grantees subject to restriction. Likewise, nothing in the situation before Congress or in the legislative history even hints that Congress had that intention but neglected to make it express. The limitation, therefore, cannot be read into the Act.

The argument to the contrary is founded upon the assumption that "the 1936 Act made the exemption a personal right" (Pet. 23) because it exempted "lands title to which is now held by an Indian * * * heretofore purchased out of trust or restricted funds of said Indian"; and from that premise it is argued that since the 1937 amendment was intended to limit the 1936 Act the exemption continued to be personal and terminates upon any transfer of the lands. We dispute the soundness of that assumption on the ground that the word "said" is not strong enough to compel

the conclusion that Congress departed from its practice of attaching exemptions and restrictions to *lands* and not to their owners (see p. 41, *infra*). But even if the 1936 Act should be so construed, there is no reason to suppose that the 1937 Act, contrary to its plain words, was intended to incorporate the same limitation. Unquestionably, the chief purpose was to limit the sweeping exemption of all lands, granted by the 1936 Act, to homestead lands but there is no inconsistency between that object and a purpose to enlarge the exemption accorded to the relatively small amount of homestead lands so that it would also apply to restricted homesteads which had passed to grantees. The fact that so extensive a change in wording was made in the Act is highly persuasive that this change in sense was intended. If the only object was to limit the application of the Act to homesteads, that purpose could have been readily accomplished simply by substituting the word "homesteads" for the word "lands."[23]

Moreover, to make the exemption run with the land so long as it remained restricted was consistent with a well defined congressional policy. Allotted lands, for the most part, were restricted for fixed periods of time and, from time to time, the

[23] The only relevant legislative material is the report of the Senate Committee on Indian Affairs (S. Rep. 332, 75th Cong., 1st Sess.). It explains that the 1936 Act was too sweeping in classes of property covered, and that the substitute was proposed by the Commissioner of Indian Affairs.

duration of the restrictions has been extended. In such cases, even apart from express statutes, the restrictions run with the land when it descends to the heirs, *Bowling* v. *United States*, 233 U. S. 528; *United States* v. *Reily*, 290 U. S. 33; and in the case of *inter vivos* transfers—assuming the lands could be transferred with approval of the Secretary—the same result has been accomplished by the Secretary's inserting a restriction in the deed to the grantee as a condition of approving the transfer (see pp. 23–24, 32, *supra*). Moreover, the exemption granted by the Acts of March 2, 1931, and June 20, 1932, to restricted lands thereafter purchased with the proceeds of allotted lands passes with the lands. In view of this general background and the precise analogy of the 1931 and 1932 Acts, it would be reasonable to suppose, even if the 1937 act were ambiguous, that when Congress granted the tax exemption to homestead lands theretofore purchased out of restricted funds, it made that exemption also run with the restriction and with the land. The instant case is stronger for that is the clear effect of the statutory words.

## IV

### THE ACTS OF JUNE 20, 1936, AND OF MAY 19, 1937, ARE CONSTITUTIONAL.

As pointed out in our discussion of the historical background of the statutes involved, the Federal Government has always exercised the undisputed

power to protect the Indians from their white neighbors, official and unofficial, and to protect both tribal and individual property. This power was the basis of the dealings of the United States with the Creek Tribe. When the vast domain of the Creeks east of the Mississippi was surrendered to the United States, the Federal Government undertook to protect the new Creek lands west of the Mississippi against interference by any future State. Treaty of March 24, 1832, Article XIV, 7 Stat. 366, 368. Again, when at the start of the present century the Creek tribe was induced to surrender the greater part of its tribal lands and to permit the allotment of its lands in severalty (see p. 18, *supra*), an essential part of the agreement was the specific promise of the Federal Government to protect the individual lands from taxation. Act of March 1, 1901, 31 Stat. 861, as supplemented by Act of June 30, 1902, 32 Stat. 500. The exercise from earliest years down to the present day of this power to protect Indian lands against all forms of alienation, encumbrance or interference is the strongest possible evidence of the existence and vitality of the power. Cf. *Kansas Indians, supra.*, Where Congress deems it necessary to forbid State taxation in order to protect such lands, it has the power to enact the appropriate legislation and the wisdom of that policy is not open to question by litigation. The uniform decisions of this Court upholding without exception

every Act of Congress protecting Indian property leave no basis for petitioners' attack upon the constitutionality of the stututes here in question.

Alternatively, the statutes involved are clearly constitutional on the ground that the purchased lands are means by which the federal government carries out its Indian policy and which Congress may therefore exempt from the interfering effects of taxation by the States. There can be no doubt of the power of Congress to exempt from State taxation the lands allotted to individual Indians from tribal reservations and held by them subject to restrictions against alienation or encumbrance. The source of that authority has been outlined above. (See pp. 15–21, *supra.*) The United States has the governmental duty and power not only to preserve and manage Indian property, but also to support and educate the Indians themselves. The allotment of tribal lands in severalty and the retention of a measure of control by restricting alienation or encumbrance is an exercise of those admitted powers. The lands are in a true sense the instruments of authorized federal activity, no less so than if the United States owned the lands and gave their use to the Indians. On these grounds, the lands may be rendered immune from interference by State taxation. *United States* v. *Rickert*, 188 U. S. 432; *Choate* v. *Trapp*, 224 U. S. 665; *Gleason* v. *Wood*, 224 U. S. 679; *Choctaw & Gulf R. R.* v. *Harrison*, 235 U. S. 292; *Indian Ter-*

*ritory Illuminating Oil Co.* v. *Oklahoma*, 240 U. S. 522; *Howard* v. *Gypsy Oil Co.*, 247 U. S. 503; *Large Oil Co.* v. *Howard*, 248 U. S. 549; *Ward* v. *Love County*, 253 U. S. 17; *Oklahoma* v. *Barnsdall Corp.*, 296 U. S. 521; *Board of Commissioners* v. *United States*, 308 U. S. 343; cf. *Goudy* v. *Meath*, 203 U. S. 146; *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575.

This established power to exempt restricted allotted lands from State taxation does not rest upon any peculiar characteristics resulting from their former ownership by Indian Tribes which were regarded as being beyond the jurisdiction of the States (see pp. 9, 15, *supra*). It is simply an illustration of the power of the federal government, when it is engaged in lawful activities "to protect the operations thus validly authorized" against interference or hindrance through taxation by the States. *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21, 33. The most familiar illustrations of the exercise of this protective power are the immunities conferred upon government financial corporations,[24] but the power itself is not so confined, and there are several closer analogies to the power to exempt Indian lands, dominion over which is divided between the United States and the Indians.

[24] E. g., *McCulloch* v. *Maryland*, 4 Wheat. 316; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180; *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21; *Federal Land Bank* v. *Bismark Co.*, 314 U. S. 95.

For example, property owned and employed by the federal government may, of course, be exempted from State taxation even though it has been taken only in collection of taxes and for resale to a private owner. *Van Brocklin* v. *Tennessee*, 117 U. S. 151; *Lee* v. *Osceola Imp. District*, 268 U. S. 643. Likewise, the federal government may provide that bonus payments made to assist former soldiers shall be exempt from State taxation even after complete ownership of the money has been transferred to the veteran. *Trotter* v. *Tennessee*, 290 U. S. 354, 356; *Lawrence* v. *Shaw*, 300 U. S. 245. See also *Bank* v. *Supervisors*, 7 Wall. 26; *Railroad Company* v. *Peniston*, 18 Wall. 5. The decision in *Helvering* v. *Mountain Producers Corp*, 303 U. S. 376 U. S. 575, both questions were answered affirma- upon the general protective power of Congress or upon the specific authority to grant a tax-exemption to restricted Indian lands allotted from tribal reservations.

The only possible questions in the instant case, therefore, are, first, whether the federal power reaches to lands acquired from private persons for Indian ownership with restricted Indian funds and, second, whether it is reasonably appropriate to the exercise of that power to exempt the lands from tax. In *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 567, both questions were answered affirmatively, although it was held that such lands were subject to tax in the absence of an express statutory

immunity.[25] Earlier, in *Goudy* v. *Meath*, 203 U. S. 146, it was assumed that Congress had power to immunize even unrestricted Indian property from state taxation. We submit that the affirmative answers are correct and that the rationale of the *Shaw* case should be followed.

As we have pointed out (pp. 15–16, *supra*) the control of the federal government over the original tribal property necessarily comprehended the power to develop or convert it into other assets. Likewise, the governmental duty and power to protect, support and educate the Indians often required that allotted lands unsuited for that purpose be leased or sold and that the proceeds be used to purchase other lands on which the Indians may be settled and given appropriate responsibilities subject to proper control. Such purchases have been a recognized part of the general function of superintending Indian affairs.

In *Sunderland* v. *United States*, 266 U. S. 226, it was held that the federal power reached so far in the absence of opposition from a State. The present opposition of Oklahoma, if such there is, cannot lessen the national authority, which in its sphere is dominant and supreme. Moreover, when Oklahoma became a State, it was stipulated by the

[25] The power of Congress to immunize from taxation properties and other federal instrumentalities which have no implied immunity is, of course, well established. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 161; *Helvering* v. *Gerhardt*, 304 U. S. 405, 411–412; *Federal Land Bank* v. *Bismark Co.*, 314 U. S. 95.

Enabling Act that the federal power with respect to the Indians should not be affected by her admission as a State. Oklahoma Enabling Act of June 16, 1906, Section 1, 34 Stat. 267; *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Choate* v. *Trapp*, 224 U. S. 665; *Ex parte Webb*, 225 U. S. 663. Indeed, petitioners do not deny that the United States has power to purchase privately owned lands for individual Indians out of the proceeds of sales or leases of allotted lands, and to restrict them against alienation or encumbrance without its approval.

2. It was a reasonable and appropriate exercise of its power to protect federal activities from interference for Congress to exempt from tax restricted Indian lands acquired out of the proceeds of restricted, allotted lands.[20] The lands acquired with restricted funds and held by individual Indians subject to restrictions against alienation or encumbrance are the media of federal activity precisely to the same extent as tribal lands allotted in severalty; both are the means by which the Government preserves and manages the Indian's property, and by which it supports and develops the Indians themselves. When the statute involved was enacted, it will be recalled, experience had demonstrated not

[20] We assume *arguendo* that the question whether Congress could properly find that the grant of immunity was necessary is a proper subject for judicial inquiry. Cf. *McCulloch* v. *Maryland*, 4 Wheat. 316, 421.

only that individual Indians either could not or would not learn to pay taxes on their restricted lands, but also that the restriction on alienation or encumbrance deemed necessary for the Indians' protection made it difficult to raise money to meet taxes on the land; moreover, many of the lands had been acquired on the assumption that they would be tax-free. (See pp. 22–31, *supra*). These circumstances alone are plainly sufficient to evoke the power of Congress to protect the instruments of its policy and prevent interference with its Indian program. And the consistency with which successive Congresses have granted immunity from taxation to lands restricted against alienation is itself proof that the exemption is a necessary and proper incident of the using restricted lands for the benefit of the Indians.

It is true that at the present time federal control over many lands acquired with restricted funds is exercised only by inserting "a conveyancer's restriction" against alienation or encumbrance in the deed by which title was taken. But, as we have shown (see pp. 22–25, *supra*), the property nonetheless is Indian property and at all times subject to federal control, which is complete except as limited by the guarantees of due process of law. *Brader* v. *James*, 246 U. S. 88; *Choate* v. *Trapp*, 224 U. S. 665; cf. *United States* v. *Creek Nation*, 295 U. S. 103, 109–110. Moreover, the tenure of the Indian under such a deed does not

differ in any respect now significant from his holding under a trust patent issued under the General Allotment Act, or under an allotment made under a statute expressly restricting his powers of alienation. In all these cases, the Indian is limited only in his power to dispose of the property and, with that exception, he may manage it as would its absolute owner, turning it to the same uses as any private property in the State.

The retention of so slight a measure of control does not deprive the property of its character as a means of carrying on federal activities. It is by giving the Indian the widest possible dominion over the property and by allowing him to put it to appropriate uses that he is educated to assume ordinary responsibilities; and, at the same time, through the restriction against alienation or encumbrance the property is protected against his own improvidence or any overreaching by others. In short, the divided ownership is the very characteristic which renders the property a federal instrument; the situation is precisely the same as if the United States bought and owned the land and gave its use to the Indian in order to support and educate him.

The exemption here involved, moreover, is narrowly limited. There has been no attempt to immunize individual Indians from State taxation and in that way to fulfill the Governmental obligation to maintain them. Only the lands are immunized

from State taxation, only the means by which the federal Government acts; and the taxes sought to be imposed were ordinary real estate taxes on the lands.[27]

Nor is there any showing that an excessive amount of land is made exempt. Under the Act of June 20, 1936, which applied to all restricted lands theretofore purchased with trust or restricted funds, the exemption apparently was broader than necessary and might embarrass the States by withdrawing an excessive amount of property from the reach of their taxing power, but even in that instance the reasons for protecting all Indian property clearly were sufficient to make the ultimate issue one of policy and not of power. Moreover, the Act of May 10, 1937, promptly limited the exemption to 160 acres (or in the cities, to land of a certain value), designated as a homestead, a minimum acreage which Congress evidently believed should be guaranteed to each Indian and which it concluded should therefore be withdrawn from taxation by the State.

In view, therefore, of the consistent course of Indian policy and experience, both Acts are clearly an appropriate exercise of the federal power to protect its activities and the instrumentalities thereof from the interfering consequences of State taxation. Cf. *United States* v. *Wright*, 53 F. (2d) 388 (C. C. A. 4), certiorari denied, 285 U. S. 539.

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[27] Compare *Oklahoma Tax Commission* v. *United States*, Nos. 623-625, this Term, certiorari granted, February 15, 1943, involving Oklahoma inheritance taxes.

Petitioners seek to distinguish the instant case from those involving allotted lands on the ground that these lands had been subject to State taxation and are now sought to be withdrawn. The difference is irrelevant. Whenever the national government acquires additional property from private ownership, something is withdrawn from State taxation. The increasing volume of such withdrawals as federal activity expands may invite legislative consideration of the entire problem;[28] but the constitutional power to forbid State taxation is plain (see pp. 44–45, *supra*). In respect to Indian lands the situation is the same. The United States has the power to acquire lands for Indian purposes and to withdraw them from State taxation. *United States* v. *McGowan*, 302 U. S. 535, 537; *Minnesota* v. *United States*, 125 F. (2d) 636 (C. C. A. 8). The large acreage owned by Indians in Oklahoma subject to restrictions may raise questions concerning how far such land may be granted exemption from State taxation without unduly hampering the collection of revenues necessary to the State.[29] Nevertheless, the power to

[28] See Executive Order 8034, 4 Fed. Reg. 249.

[29] It is certainly arguable that the exemption of lands purchased with the trust or restricted funds of individual Indians does not result in a net reduction of the mass of property subject to state taxation. "The states will not suffer from such a practice, for in return for the lost taxes on the purchased lands will be the subjection to the state taxing power of the relinquished lands, or of the funds used in making the new purchase."—Meriam, *The Problem of Indian Administration* (1928), p. 797.

confer the exemption exists and the decision whether to exercise it is one for Congress to make. In the instant case, as we have shown, Congress carefully struck a fair balance between opposing considerations.

It is immaterial that the respondents are citizens. It has been held too many times to admit of dispute that the grant of citizenship to the Indians is not inconsistent with their status as "wards" whose property is subject to the plenary control of the federal government, *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Heckman* v. *United States*, 224 U. S. 413; *United States* v. *Nice*, 241 U. S. 591, 598; *Brader* v. *James*, 246 U. S. 88, 96.

Likewise, it is settled that respondents, though not enrolled, are tribal Indians. As a result of the negotiations between the Five Civilized Tribes and the Dawes Commission, the members of the Tribes then living were enrolled for the purpose of determining disputes concerning ownership of tribal property and the right to allotments. Children having half blood or more are recognized by Congress as tribal Indians subject to federal control (e. g., Act of January 27, 1933, 47 Stat. 777) and they remain in that status until discharged by Congress. *Elk* v. *Wilkins*, 112 U. S. 94; *United States* v. *Ramsay*, 271 U. S. 467; *United States* v. *McGowan*, 302 U. S. 535.

Although the legislation enacted in 1901 and 1902 looked to the dissolution of the Creek Tribe and fixed the date of March 4, 1906, for the effectuating of such dissolution, the provision was later revoked by the joint resolution of March 2, 1906, 35 Stat. 822, and the Act of April 26, 1906, Sec. 28, 34 Stat. 137, 148. The Creek Tribe still exists in law and in fact and it has recently been authorized to resume many of its former powers. (Act of June 26, 1936, 49 Stat. 1967). There is thus no ground for regarding the tribal Indians concerned in this litigation as different from other tribal Indians in respect to the power of Congress to act for their protection.

## CONCLUSION

The decision of the circuit court of appeals should be affirmed.

Respectfully submitted.

CHARLES FAHY,
*Solicitor General.*

NORMAN M. LITTELL,
*Assistant Attorney General.*

NORMAN MACDONALD,
ARCHIBALD COX,
*Attorneys.*

WARNER W. GARDNER,
*Solicitor, Department of the Interior.*

MARCH, 1943

# APPENDIX

The Act of June 20, 1936, 49 Stat. 1542:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That there is hereby authorized to be appropriated, out of any money in the Treasury of the United States not otherwise appropriated, the sum of $25,000, to be expended under such rules and regulations as the Secretary of the Interior may prescribe, for payment of taxes, including penalties and interest, assessed against individually owned Indian land the title to which is held subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of an Indian, where the Secretary finds that such land was purchased with the understanding and belief on the part of said Indian that after purchase it would be nontaxable, and for redemption or reacquisition of any such land heretofore or hereafter sold for nonpayment of taxes.

SEC. 2. All lands the title to which is now held by an Indian subject to restrictions against alienation or encumbrance except with the consent or approval of the Secretary of the Interior, heretofore purchased out of trust or restricted funds of said Indian, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress.

The Act of May 19, 1937, 50 Stat. 188, amended Section 2 of the Act of June 20, 1936, to read:

SEC. 2. All homesteads, heretofore purchased out of the trust or restricted funds of individual Indians, are hereby declared to be instrumentalities of the Federal Government and shall be nontaxable until otherwise directed by Congress: *Provided,* That the title to such homesteads shall be held subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior: *And provided further,* That the Indian owner or owners shall select, with the approval of the Secretary of the Interior, either the agricultural and grazing lands, not exceeding a total of one hundred and sixty acres, or the village, town, or city property, not exceeding in cost $5,000, to be designated as a homestead.

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